

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES SCOTT, an individual

Plaintiff,

vs.

GRANGE INSURANCE ASSOCIATION, a
domestic insurer,

Defendant.

NO. CV-06-104-JLQ

**ORDER GRANTING PLAINTIFF'S
MOTION FOR REMAND**

BEFORE THE COURT is the Plaintiff's Motion For Remand. (Ct. Rec. 2). Plaintiff is requesting that this court remand the matter to the Spokane County Superior court for further proceedings. **J. Scott Miller** represents the Plaintiff. **Donald B. Scaramastra** represents the Defendant.

BACKGROUND

This case was originally filed on May 3, 2005, in Spokane County Superior Court. In his original state court complaint, the Plaintiff alleged two causes of action: (1) violations of wage and hourly laws, including the federal Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, and Washington's Minimum Wage Act, RCW 49.46.010, *et seq.*, and (2) breach of contract and wrongful withholding of wages and/or employment benefits. The Defendant Grange Insurance Association filed a Notice Of Appearance in state court on May 12, 2005, and an Answer To Complaint And Affirmative Defenses on June 8, 2005, again in state court. On March 26, 2006, in state court, Plaintiff filed a Motion For Leave To Amend The Pleadings Pursuant To CR 15(b), to initiate a class action on the same claims as alleged in his original state court Complaint, and attached thereto was a proposed amended Class Action Complaint. Defendant received a copy of

1 the proposed amended Complaint on March 27, 2006, although the Defendant has not yet
2 been formally served. From the record it appears that the Spokane County Superior
3 Court has not acted on the Plaintiff's Motion For Leave To Amend The Pleading
4 Pursuant To CR 15(b). On April 12, 2006, Defendant filed a Notice Of Removal Of
5 Action Under 28 U.S.C. § 1441(b) (Federal Question) in this court. Plaintiff filed a
6 Motion For Remand on May 12, 2006. On May 26, 2006, Defendant filed Defendant's
7 Memorandum In Opposition To Plaintiff's Motion For Remand. Plaintiff filed a reply on
8 June 5, 2006.

9 The Defendant appears to be claiming two bases for removal to this court. First,
10 Defendant argues that this court has original jurisdiction under 28 U.S.C. § 1331 because
11 the Plaintiff brings a cause of action under the federal Fair Labor Standards Act, 29
12 U.S.C. § 216, and is removable pursuant to 28 U.S.C. § 1441(b). Second, Defendant
13 argues that as a class action, 28 U.S.C. § 1332(d)(2) is a separate basis for original
14 jurisdiction, and is removable pursuant to 28 U.S.C. § 1453(b). The Defendant claims
15 this court would then have supplemental jurisdiction over the state law claims under 28
16 U.S.C. § 1367.

17 In his Motion For Remand (Ct. Rec. 2), the Plaintiff challenges the Defendant's
18 removal on two grounds. First, Plaintiff argues that Defendant's removal is untimely
19 pursuant to 28 U.S.C. § 1446(b) because Plaintiff's initial pleading, filed almost a year
20 before Defendant's removal, contained a cause of action under the federal Fair Labor
21 Standards Act. Second, Plaintiff argues that removal based on 28 U.S.C. § 1332(d)(2)
22 and 28 U.S.C. § 1453(b) is premature because the state court has not acted on Plaintiff's
23 motion seeking to file an amended Class Action Complaint.

24 JURISDICTION

25 Pursuant to 28 U.S.C. § 1441(a), a defendant may remove "any civil action brought
26 in a State court of which the district courts of the United States have original
27 jurisdiction." *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 163 (1997). Thus,
28 removal depends on whether the plaintiff could have filed the case in federal court

1 originally. District courts have original jurisdiction over “all civil actions arising under
2 the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331; *City of*
3 *Chicago*, 522 U.S. at 163. There is a “strong presumption” against removal jurisdiction
4 and therefore courts construe removal statutes restrictively. *See, e.g., Gaus v. Miles, Inc.*,
5 980 F.2d 564, 566 (9th Cir. 1992) (stating that “[f]ederal jurisdiction must be rejected if
6 there is any doubt as to the right of removal in the first instance”). The party invoking
7 removal bears the burden of establishing that removal is proper and must show that all
8 substantive and procedural requirements have been met. *Id.* at 566-67.

9 The procedure for removal is set forth by 28 U.S.C. § 1446. Pursuant to the first
10 paragraph of 28 U.S.C. § 1446(b), an action must be removed within 30 days of a
11 defendant’s receipt of the initial pleading setting forth a removable claim, otherwise, the
12 served defendant waives his right of removal. *Cantrell v. Great Republic Ins. Co.*, 873
13 F.2d 1249, 1256 (9th Cir. 1989). Moreover, the mere addition of defendants to the initial
14 pleading, or changes in the complaint which create a “new” basis for removal, generally
15 do not “undo the waiver.” *See Samura v. Kaiser Foundation Health Plan, Inc.*, 715 F.
16 Supp. 970, 972 (N.D. Cal. 1989) (stating that “[i]f the case is removable from the outset,
17 it must be removed within the thirty-day period specified by § 1446(b); subsequent
18 events do not make it ‘more removable’ or ‘again removable.’” (citation omitted)). Once
19 waived, the right to removal is generally waived forever, regardless of the changes to the
20 case. *Dunn v. Gaiam*, 166 F. Supp. 2d 1273, 1278-79 (C.D. Cal. 2001). In this case, the
21 Plaintiff’s initial pleading, filed in state court on May 3, 2005, alleges violations of the
22 federal Fair Labor Standards Act. The Defendant concedes, in Defendant’s
23 Memorandum In Opposition To Plaintiff’s Motion For Remand, that the action was
24 removable on its face when originally filed. Thus, because the action was removable
25 when it was first filed, the thirty-day period began with service of the initial Complaint
26 and has closed.

27 The second paragraph of 28 U.S.C. 1446(b), provides that if the claim was not
28 removable at the time of the initial pleading, an action must be removed within 30 days of

1 the defendant first ascertaining, based on an amended pleading or other papers, that the
2 case is or has become removable. Because this action was initially removable, however,
3 the ability to use the amended pleading as a basis for removal based on the second
4 paragraph of 28 U.S.C. § 1446(b) does not apply. *See Richey v. Upjohn Drug Co.*, 139
5 F.3d 1313, 1316 (9th Cir. 1998) (stating that "[t]he second paragraph addresses a
6 defendant's right to remove beyond the initial period of 30 days, if the case only becomes
7 removable sometime after the initial commencement of the action").

8 The issue is therefore whether the court should apply the "revival exception," a
9 judicially-created exception to the thirty-day requirement of paragraph one of section
10 1446(b), because the Plaintiff is seeking to file an amended Class Action Complaint, as
11 argued by the Defendant. The "revival exception" was originally recognized in *Cliett v.*
12 *Scott*, 233 F.2d 269, 271 (5th Cir. 1956) (holding that "though a defendant has submitted
13 himself to state court jurisdiction on one cause of action, this does not prevent his
14 removing the cause when an entirely new and different cause of action is filed") and
15 *Wilson v. Intercollegiate (Big Ten) Conf. Athletic Assoc.*, 668 F.2d 962 (7th Cir. 1982)
16 and applied in *Johnson v. Heublein*, 227 F.3d 236 (5th Cir. 2000).

17 In *Wilson*, plaintiff's amended complaint supplemented his original equal
18 protection claim with a "scattershot of new federal claims" and, for the first time,
19 quantified his damages. *Id.* at 964. The court described how the right to removal may be
20 "revived," allowing a defendant to remove an action after the thirty-day bar, "where the
21 plaintiff files an amended complaint that so changes the nature of [the] action as to
22 constitute 'substantially a new suit begun that day.'" *Id.* at 965 (quoting *Fletcher v.*
23 *Hamlet*, 116 U.S. 408, 410 (1886)). The exception is not "self-defining" and must
24 therefore be applied on a case-by-case basis with reference to its purpose, the purpose of
25 the thirty-day limitation, and the proper allocation of decision-making responsibilities
26 between state and federal courts. *Id.* at 965. The court recognized that the thirty-day
27 limitation serves two purposes: (1) it deprives a defendant of an undeserved tactical
28 advantage of testing the waters of state court before removing, and (2) it prevents delay

1 and waste of resources involved in starting a case over in a second court after significant
2 proceedings have occurred in the first. *Id.* Upon consideration, the court concluded that
3 the new federal claims did not meet the revival standard because they did not create a
4 substantially new suit. *Id.* at 966-67. Instead, the changes in the complaint only further
5 showed that the treatment of which the plaintiff previously complained was unlawful. *Id.*
6 Therefore, although generally credited with coining "the right of revival," the court found
7 that it did not apply based on the facts in the case.

8 *Johnson v. Heublein*, 227 F.3d 236 (5th Cir. 2000) appears be the only case where
9 a court has relied upon the "revival exception." In *Johnson*, the original complaint was
10 filed against five defendants. The Plaintiffs amended the complaint to realign the parties,
11 changing two of the defendants to plaintiffs. Then one of the new plaintiffs added claims
12 for breach of contract, bad faith breach of contract, unjust enrichment, and fraud to the
13 original conversion claim. *Id.* at 238-40. The court determined that after the changes, the
14 amended complaint no longer resembled the allegations in the original complaint. *Id.* at
15 242.

16 Although the "revival exception" has been used sparingly in other circuits, there
17 does not appear to be a reported case of its application in the Ninth Circuit. *See Sumara*,
18 715 F. Supp. at 972; *Dunn*, 166 F. Supp. 2d at 1279. In *Dunn*, a 2001 case from the
19 Central District of California, the court considered whether the right to removal, once
20 waived, could be "revived" when the plaintiffs file an amended complaint containing an
21 additional claim which is also within the original jurisdiction of the district court. The
22 plaintiff's amended complaint added five new defendants and fifteen new causes of
23 action, including a federal RICO claim. *Id.* at 1276. The court noted the strong
24 presumption against removal and questioned the wisdom of using the exception at all. *Id.*
25 The court determined that while "the defendants may have been understandably surprised
26 to see that a RICO claim was added," the amended complaint neither changed the scope
27 of liability nor the alignment of the parties substantially enough to merit the application
28 of the exception. *Id.* at 1279-80.

1 Based on the foregoing, there appear to be two instances where the application of
2 the “revival exception” is warranted: (1) when a plaintiff attempts to mislead a defendant
3 about the true nature of its claim by including a less consequential federal claim unlikely
4 to be removed, and later, after the thirty-day widow has expired, amends the complaint to
5 include a substantive federal claim, and (2) when the effect of the change is to
6 substantially constitute a new suit. *Johnson v. Heublein, Inc.*, 227 F.3d 236, 242 (5th Cir.
7 2000); *Wilson*, 668 F.2d at 965-66; *Samura*, 715 F. Supp. at 972.

8 However, removal based upon a class action under 28 U.S.C. § 1332(d) and 28
9 U.S.C. § 1453(b), which Defendant argues has "revived" its right to removal, is
10 premature. As the Defendant argues, section 1332(d), which provides this court with
11 original jurisdiction over certain class action lawsuits, defines “class action” as “any civil
12 action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute
13 or rule of judicial procedure authorizing an action to be brought by 1 or more
14 representative persons as a class action,” 28 U.S.C. § 1332(d)(1)(B), meaning that filing
15 rather than certification is the benchmark permitting removal under 28 U.S.C. § 1453(b).
16 While that may be the case, as the matter appears to stand presently in state court,
17 Plaintiff has filed a Motion For Leave To Amend The Pleadings Pursuant To CR 15(b)
18 with a proposed amended Class Action Complaint attached. The Superior Court has not
19 acted on the motion. As such, the Plaintiff's proposed amended Class Action Complaint
20 has not been filed. It is therefore not necessary for this court to determine if removal
21 would have been proper if the proposed amended Class Action Complaint had been filed
22 and whether it created a substantially new and different lawsuit, which the court doubts.

23 Accordingly, **IT IS HEREBY ORDERED:**

- 24 1. Plaintiff's Motion For Remand is **GRANTED**. (Ct. Rec. 2).
- 25 2. The matter is remanded to the Spokane County Superior Court pursuant to 28
26 U.S.C. § 1447(c).
- 27 3. The Clerk of this Court shall mail a certified copy of this Order to the clerk of
28 the Spokane County Superior Court of Washington. The State court may

thereupon proceed with the case under it cause No. 05-02-02134-3.

IT IS SO ORDERED. The Clerk is hereby directed to enter the Order, forward copies to counsel, furnish a copy to the clerk of the Spokane County Superior Court, referencing its case NO. 05-02-02134-3, and close the file.

DATED this 8th day of June 2006.

s/ Justin L. Quackenbush

JUSTIN L. QUACKENBUSH
SENIOR UNITED STATES DISTRICT JUDGE